

Appeal Nos. 18-1323, 18-1325

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

LONNY E. BALEY, et al., JOHN ANDERSON FARMS, INC., et al.,

Plaintiffs-Appellants,

v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS

Defendants-Appellees,

*On Appeal from the United States Court of Federal Claims in Case No. 1:01-CV-
00591-MBH (Hon. Marian Blank Horn)*

**AMICUS BRIEF OF HOOPA VALLEY TRIBE
SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CERTIFICATE OF INTEREST

Counsel for the *amicus curiae* Hoopa Valley Tribe certifies the following information pursuant to Rule 47.4 of the Federal Circuit Rules of Procedure:

1. The full name of the *amicus curiae* represented by me is: **Hoopa Valley Tribe**
2. The name of the real party in interest represented by me is: **N/A.**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amicus curiae* represented by me are: **None.**
4. The names of all law firms and the partners and associates that have appeared for the *amicus curiae* now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. **None.**

Dated this 21st day of September, 2018.

/s/ Thomas P. Schlosser
Signature of Counsel

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STATEMENT OF INTEREST

This amicus curiae brief is submitted on behalf of the Hoopa Valley Tribe (“Tribe”). In 1864, the United States reserved the Hoopa Valley Indian Reservation (“Reservation”) as a permanent homeland for the Hoopa people. The Klamath River and its tributary Trinity River both flow through the Reservation. The Reservation is located within California and downstream from the Klamath Irrigation Project (“Project”), which diverts water for agricultural purposes that would otherwise flow in the Klamath River through the Reservation.

Fish and water resources of the Klamath and Trinity Rivers are the mainstay of the life and culture of the Tribe. Since time immemorial, Hoopa people have fished the Klamath River for anadromous salmon including coho and Chinook. Under federal law, the Tribe retains reserved fishing rights in the Klamath River and reserved water rights to maintain its anadromous fishery. The United States has a fiduciary trust obligation under federal law to protect the Tribe’s reserved rights. The Tribe’s fishing opportunities have been greatly diminished due to upstream impacts including those associated with the Project’s water diversions.

The Court of Federal Claims (CFC) relied on the priority of the Tribe’s senior federal reserved water right to deny monetary relief to Plaintiffs-Appellants. Plaintiffs-Appellants and their supporting amici make assertions regarding the existence, scope, and enforceability of the Tribe’s federal reserved rights that are

factually and legally incorrect. The Tribe presents this brief to provide necessary information regarding its federal reserved fishing and water rights.

This brief is filed with leave of court pursuant to FRAP 29(a)(2). No party's counsel authored any portion of this brief. No party, party's counsel, or any other person or entity besides the Hoopa Valley Tribe contributed money to fund preparation or submission of this brief.

ARGUMENT

I. The United States Reserved the Hoopa Valley Reservation as a Permanent Homeland for Hoopa Indians, Including Federal Reserved Rights to Fish and Water Resources of the Klamath River.

The United States located and set aside the Hoopa Valley Reservation on August 21, 1864. *Mattz v. Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973) (discussing Reservation history). Congress authorized establishment of the Reservation by its Act of April 8, 1864, 13 Stat. 39, which authorized the President to set aside tracts of land within California “for the purposes of Indian reservations.” *Mattz*, 412 U.S. at 489. The Act required the Reservation to be “located as remote from white settlements as may be found practicable.” *Short*, 202 Ct. Cl. at 877. On June 23, 1876, President Grant issued an Executive Order formally setting aside the Reservation “for Indian purposes.” *Id.* at 876. This “subsequent proclamation of the President merely gave formal sanction to an accomplished fact.” *See United States v. Walker River Irr. Dist.*, 104 F.2d 334, 338 (9th Cir. 1939) (explaining Walker River reservation was established by the Indian Commissioner’s action in 1859, not by President Grant’s later executive order).

The Klamath River and its largest tributary, the Trinity River, flow through the Reservation, which presently encompasses a 12-mile square historically inhabited by Hoopa people. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366,

1370-71 (Fed. Cir. 2000). From 1891 through 1988, the Reservation also included a strip of land through which the lowest stretch of the Klamath River flows to the Pacific Ocean (the “Addition”). *Id.* During that time, the Reservation consisted of the “Square” and the “Addition” and was shared by Hoopa and Yurok people. *Id.*; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). In 1988, Congress partitioned the “Joint Reservation” into separate reservations for Hoopa and Yurok. *Parravano*, 70 F.3d at 542. Congress acknowledged the Tribes’ federal reserved fishing rights when partitioning the Joint Reservation. *Id.* at 546.¹

In 1864, the United States determined the Reservation a suitable permanent homeland for Hoopa Indians for two principal reasons. First, the Reservation is located in the heart of the Tribe’s aboriginal lands, which Hoopa Indians occupied and fished upon for generations. *Id.* at 542. Hoopa people refused to relocate to other lands and were provided a reservation at their traditional homeland at the intersection of the Klamath and Trinity rivers. *Shermoen v. United States*, 982 F.2d 1312, 1315 (9th Cir. 1992); *Ammon*, 209 F.3d at 1371. Hoopa Indians possessed fishing and hunting rights long before contact with white settlers and

¹ The Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i-1300i-11, followed substantial litigation regarding allocation of timber revenues derived from the “Square.” *Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1281 (Fed. Cir. 2010); *Ammon*, 209 F.3d at 1372; *Short*, 202 Ct. Cl. at 874. Those opinions address competing claims of Hoopa and Yurok people to timber revenues and do not address the Tribes’ federal reserved fishing and water rights.

their salmon fishery was “not much less necessary to [their existence] than the atmosphere they breathed.” *Parravano*, 70 F.3d at 542, quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981); *United States v. Winans*, 198 U.S. 371, 381 (1905). Second, the Reservation set aside sufficient resources of the Klamath and Trinity rivers for Hoopa people to be self-sufficient and achieve a moderate living based on fish. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (noting the Indians’ right to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes); Solicitor Opinion M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes, October 4, 1993, p. 27 (explaining the Tribes are “entitled to a sufficient quantity of fish to support a moderate standard of living” though not more than 50% of the total harvestable quantity); *Parravano*, 70 F.3d at 544-546 (recognizing Hoopa’s reserved fishing rights).

A. The Hoopa Valley Tribe Retains Federal Reserved Rights To Take Fish Within Their Reservation From the Klamath and Trinity Rivers For Ceremonial, Subsistence, and Commercial Purposes to Support A Moderate Livelihood For Hoopa People.

When the United States set aside the Reservation, it reserved for the Indians federally protected fishing rights to harvest anadromous fish in the Klamath and Trinity rivers, which travel through the Reservation to the ocean and back to upstream spawning grounds that currently terminate at Iron Gate Dam on the Klamath River. *Eberhardt*, 789 F.2d at 1359; *Parravano*, 70 F.3d at 544-546. Traditional salmon fishing was one of the “Indian purposes” for which the

Reservation was created. *Parravano*, 70 F.3d at 546. “The fact that the [Hoopa] reservation, when created, was riparian to the Klamath River leads inescapably to the conclusion that the right to take fish from the river was reserved to the Tribe and that the Indians understood the reservation to include the right to fish.” *United States v. Wilson*, 611 F. Supp. 813, 818 (N.D. Cal. 1985), *rev’d on other grounds sub. nom U.S. v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986). This “interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes.” *Parravano*, 70 F.3d at 546; *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (reservation “for a home” includes fishing rights); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (right to fish implied because necessary for self-sustaining community). The present-day Hoopa Valley Tribe and its members are successors-in-interest to the Hoopa Indians for whom the Reservation was created in 1864. *See, e.g., Short*, 202 Ct. Cl. at 960-962.

The Tribe’s reserved right to take fish from the Klamath River “includes fishing for ceremonial, subsistence, and commercial purposes.” *Eberhardt*, 789 F.2d at 1359. “These rights were granted by Congress when it authorized the President to create the Reservation for Indian purposes.” *Id.* at 1360. *See also Wilson*, 611 F. Supp. at 817-818 (“In establishing the Hoopa Valley Reservation, Congress reserved those rights necessary for the Indians to maintain on the land

ceded to them their way of life, which included hunting and fishing.”); *PCFFA v. Secretary of Commerce*, 494 F. Supp. 626, 632 (N.D. Cal. 1980) (“[i]t cannot be doubted that the Indians have a right to fish on the reservation. Congress has carefully preserved this right over the years, and the courts have consistently enforced it.”); *People v. McCovey*, 36 Cal. 3d 517 (1984), cert. denied 469 U.S. 1062 (1984) (discussing the federal reserved fishing right on the Reservation); *Arnett v. Five Gill Nets*, 48 Cal. App. 3d 454, 461-62 (1975), cert. denied 425 U.S. 907 (1976) (acknowledging federal reserved Indian fishing rights on the Klamath River). These fishing rights remain central to Hoopa survival in modern times. *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1137 (N.D. Cal. 2017) (noting Hoopa reliance on Coho salmon for “their subsistence, cultural identity, rituals, and economic well-being”); *Wilson*, 611 F. Supp. at 818, fn. 5.

In 1993, the Interior Solicitor published an opinion reaffirming Hoopa reserved fishing rights. Solicitor Opinion M-36979, October 4, 1993.² Solicitor Leshy examined the “history of the reservations, the Indians’ dependence on the Klamath and Trinity River fisheries, the United States’ awareness of that dependence, and the federal intent to create the reservations in order to protect the Indians’ ability to maintain a way of life, which included reliance on the fisheries.”

² Solicitor Leshy’s Opinion M-36979 is available at: <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36979.compressed.pdf>

Id., at 3. Solicitor Leschy found “it is now well-established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights, created in the nineteenth century when the lands they occupied were set aside as Indian Reservations.” *Id.* at 14-15. “The . . . Hoopa Indians had a ‘vital and unifying dependence on anadromous fish’”. *Id.* at 22. “[T]he Government intended to reserve for the tribes on the Hoopa and Yurok Reservations a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living.” *Id.* at 21. “[C]onsidering the nature of the right, which the courts have already confirmed, and considering the Indians’ historic dependence on the fishery and the federal purposes of the reservation, the ‘reasonable livelihood’ needs must satisfy ceremonial, subsistence, and commercial fishing needs.” *Id.* at 22. The United States is trustee of Indian reserved fishing rights, and “the Departments of Interior and Commerce . . . must ensure that their actions are consistent with the trust obligations of the United States to the Tribes.” *Id.* at 28-29.

B. The Hoopa Valley Tribe Retains a Federal Reserved Water Right to an Instream Flow of Water Sufficient to Support and Maintain the Tribe’s Fishing Rights in the Klamath and Trinity Rivers.

The creation of an Indian reservation by the United States includes an implied reservation of water sufficient to fulfill the purposes for which the reservation was created. *Arizona v. California*, 373 U.S. 546, 599-601 (1963)

(“United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created”); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (United States implicitly reserved water for Indian Reservation and protecting those unquantified tribal water rights against upstream irrigators); *United States v. Adair*, 723 F.2d 1394, 1408-1411 (9th Cir. 1983), cert denied, 467 U.S. 1252 (1984) (reservation for Klamath Tribes included water to maintain tribal fishing rights). Water rights necessary to fulfill the purposes of the reservation exist whether the reservation was created by treaty or executive action. *Arizona*, 373 U.S. at 598; *Parravano*, 739 F.3d at 544-547; *Walker River*, 104 F.2d at 336.

Traditional salmon fishing is one of the purposes for which the United States established the Reservation at its location where the Tribe could take and sustain itself on fish from the Klamath River. *Parravano*, 70 F.3d at 546 (finding salmon fishing one of the purposes for which the Reservation was created); *Eberhardt*, 789 F.2d at 1359-60 (same); Solicitor’s Opinion M-36979; *see also Adair*, 723 F.2d at 1409 (“one of the ‘very purposes’ of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle”).

The Tribe’s water right for fishery purposes includes that amount of instream flow necessary to maintain the salmon fishery at harvestable quantities sufficient to fulfill the “moderate living” standard of Tribe’s federal reserved fishing rights. *Adair*, 723 F.2d at 1414-15 (holding Klamath Tribes “entitled to a

reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights”); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (holding that fishing was one purpose for creation of the Colville Reservation and that “the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery.”); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (Walton II) (quantifying instream flow for reserved tribal fishing rights); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982) (fishing was one purpose for creating Spokane Indian Reservation and “the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek.”); *Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 764-66 (Mont. 1985) (tribal reserved rights may include water for fisheries).

Courts have recognized the United States’ obligation to protect the Tribe’s reserved rights against off-reservation impacts. *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000) (Reclamation “has a responsibility to divert the water and resources needed to fulfill the [Hoopa Valley] Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators”); *Kandra v. U.S.*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying irrigators request to enjoin Reclamation’s 2001 operations plan to release flow for protection of salmon and senior tribal rights); *Parravano*,

70 F.3d at 546-48 (affirming ocean fishing regulations to protect on-reservation tribal harvest).

Reclamation's Regional Solicitor opined that Hoopa's fishery-related water right includes "the right to certain conditions of water quality and flow to support all life stages of fish." Appx. 3339 (Memorandum to Regional Director, Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan, July 25, 1995). "Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources." *Id.* at 8; *Patterson*, 206 F.3d at 1214; *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973) (Interior Secretary must meet exacting fiduciary standards for tribal benefit in operating water project affecting tribal rights).

Reserved water rights to support Indian fishing rights are created by federal law. *Adair*, 723 F.2d at 1411, fn. 19; *Greely*, 712 P.2d at 766. Federal reserved rights carry a priority date of the date that the federal reservation was established, at the latest. *Adair*, 723 F.2d at 1412-1414; *Arizona*, 373 U.S. at 600. Federal rights are not subject to state law doctrines like beneficial use, appurtenance, or abandonment. *Cappaert v. United States*, 426 U.S. 128, 145 (1976) ("federal water

rights are not dependent upon state law or state procedures”); *Arizona*, 373 U.S. at 595, n. 97, 600 (affirming water rights to Colorado River for Cocopah Reservation, which is not appurtenant to the river)³; *Adair*, 723 F.2d at 1410-11 (finding federal reserved water right for instream flows, despite that such right was not recognized by Oregon law); *Greely*, 712 P.2d at 765-66 (federal rights not subject to abandonment).

Here, as in *Adair*, the Tribe’s federal reserved water right to maintain its federal reserved fishing rights is non-consumptive. *Adair*, 723 F.2d at 1411. The “entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies.” *Id.* Non-consumptive reserved rights to maintain and preserve the Tribe’s fishing rights are entitled to protection from upstream diversions even if not quantified. *Patterson*, 204 F.3d at 1214; *Joint Board of Control v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987), cert. denied 486 U.S. 1007 (1988) (BIA, as trustee for Tribes, had authority and duty to establish and implement minimum stream flows and water levels for Indian fishery before providing water to project irrigators, despite lack of quantification of Indian rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033 (9th

³ The Klamath River flows through the Reservation; thus, the Tribe’s reserved water right for instream fishery flows is appurtenant to its land; though maintenance of the Tribe’s right may affect off-reservation junior users.

Cir. 1985), cert. denied, 474 U.S. 1032 (1985) (affirming order mandating release of water to preserve salmon eggs threatened by low post-irrigation season water flows, for purpose of protecting tribal fishing rights). *Winters* also involved federal recognition and enforcement of unquantified federal reserved rights against junior upstream diversions. *Winters*, 207 U.S. at 576-77.

Patterson, *Joint Board*, and *Kittitas* also show that the United States may release stored water to fulfill tribal water rights for maintenance and preservation of the reserved tribal fishery. *Patterson*, 204 F.3d at 1214; *Joint Board*, 832 F.2d at 1129-32; *Kittitas*, 763 F.2d at 1033-34. The relevant question is whether the senior water releases are necessary to maintain and preserve the fishery. *Id.*; *Adair*, 723 F.2d at 1410-11; *Walton*, 647 F.2d at 48. The Tribe is entitled to, and Reclamation has an affirmative duty to release to the Klamath River, water that is necessary to preserve and maintain salmon in harvestable quantities for the Tribe. *Patterson*, 204 F.3d at 1214; *Kandra*, 145 F. Supp. 2d at 1197, 1204-06. Here, the water released by Reclamation was necessary to prevent jeopardy (significant threat of extinction) to Coho salmon. Reclamation had a duty to release the water not only for ESA compliance but to protect the Tribe's senior rights. *Id.*

The Tribe's fishing right entitles it to harvestable quantities of Coho salmon to support the Tribe's ceremonial and subsistence needs and commercial fishing opportunities consistent with the moderate living standard. *See Eberhardt*, 789

F.2d at 1359. There also must be sufficient escapement of spawners to perpetuate fish runs. *Parravano*, 539 F.3d at 543-547. The Tribe's federal reserved water right consists of an instream flow necessary to maintain its fishery for these purposes. *Adair*, 723 F.3d at 1410-11; *Walton*, 647 F.2d at 48; *Joint Board*, 832 F.2d at 1131-32.

The precise amount (in excess of the amount delivered to prevent jeopardy) of water to which the Tribe is entitled to under its federal reserved rights was never at issue in this case, was not addressed by Reclamation or the CFC, and need not be addressed here. The relevant point is that any rights held by Plaintiff-Appellants are junior to the Tribe's rights and the Tribe's senior rights entitle it to *at least* as much water as was delivered to prevent jeopardy (the threat of possible extinction) to Klamath River Coho.

The Tribe's water right necessary to maintain a fishery harvest adequate to support a moderate livelihood for the Hoopa people is obviously more than the minimum flow required to prevent extinction of Klamath River coho. *Id.* The Tribe's fishing rights entitle it to more than just the presence of salmon in the river; but rather to sustainable harvestable quantities. *Parravano*, 539 F.3d at 546-47; *Eberhardt*, 789 F.2d at 1359-1362; *United States v. Washington*, 853 F.3d 946, 958, 965-66 (9th Cir. 2017), *affirmed per curiam*, 584 U.S. ____ (2018) ("moderate living" standard requires protection of continued supply of fish). The CFC did not

err in finding that the Tribe's senior water right includes *at least* the amount of water that was released by Reclamation, as federal trustee, for purposes of preventing jeopardy (possible extinction) to Klamath Coho.

II. The Project Is A Direct and Significant Cause of Harm to Coho And Reclamation Has A Legal And Fiduciary Duty to Operate the Project To Satisfy Senior Tribal Rights And ESA Obligations.

Subsequent to the Reservation's establishment, anadromous fish of the Klamath River, including Coho, have suffered significant harm from upstream impacts, including the Project, which diverts large amounts of water that would otherwise flow through the Klamath River for the benefit of salmon. *PCFFA v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085-87 (9th Cir. 2005). These impacts include loss of spawning and rearing habitat, increased water temperatures, and prevalent fish disease that thrives in conditions where fish must crowd together in low flows and increased water temperatures. *Id.*; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112 (enjoining Reclamation to release water to mitigate disease impacts to downstream Coho).

Federally-owned Link River Dam, constructed for Project purposes in 1917, regulates Klamath River flows, blocking the vast majority of natural flow from reaching the Klamath River and the Reservation and depriving fish of water necessary for habitat and life functions. Water released from Link River Dam proceeds through the downstream and privately owned Klamath Hydroelectric

Project (“KHP”) and ultimately into the Klamath River at Iron Gate Dam, which is part of the KHP and the furthest dam downstream on the River.

The KHP has minimal reservoir storage capacity and, since 1996, flows in the Klamath River downstream of Iron Gate Dam have primarily been a function of the minimum water releases ordered by Reclamation from the upstream Link River Dam. *PCFFA v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1232 (N.D. Cal. 2001); *Patterson*, 204 F.3d at 1212-13 (Reclamation controls releases from Link River Dam for purposes of providing flow in Klamath River). Since 1996, Reclamation has operated the Project with operating plans that identify minimum flow levels in the Klamath River downstream of Iron Gate Dam for protection of salmon. *PCFFA*, 138 F. Supp. 2d at 1232. Flows released from Link River Dam and ultimately from Iron Gate Dam downstream contribute the majority of instream flows utilized by fish in the Klamath River between Iron Gate Dam and the confluence with the Trinity River, which is at the Hoopa Reservation. *PCFFA*, 426 F.3d at 1085 (“The flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river.”) Following a massive anadromous fish kill that occurred in the Klamath River in 2002⁴, a report found that water releases from Iron Gate Dam made up 88% of the

⁴ In 2002 (one year after the events leading to Plaintiff’s lawsuit here), following Reclamation’s resumption of Project deliveries and corresponding

flow in the Klamath River 60 miles downstream and 73% of the flow in the Klamath River 130 miles downstream of Iron Gate Dam. *Belchik et al.*, *The Klamath River Fish Kill of 2002; Analysis of Contributing Factors* (Feb. 2004), pp. 16-17.⁵

Coho are one species of anadromous salmon that historically thrived in the Klamath River and which was harvested by Hoopa people. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1137 (describing Hoopa reliance on coho for “their subsistence, cultural identity, rituals, and economic well-being”); *Wilson*, 611 F. Supp. at 815, fn. 1 (identifying coho as significant species of anadromous fish within Klamath and Trinity rivers). Due to their depressed condition, the National Marine Fisheries Service (NMFS) listed coho in the Klamath River as threatened under the Endangered Species Act (ESA). 62 Fed. Reg. 24588 (May 6, 1997). NMFS found depletion, storage, and alteration of natural flows, with the associated loss of habitat, increase in water temperature, and increased disease risks to be a major factor leading to the depressed populations. *Id.* at 24593-24595. NMFS

diminished Klamath River flows, an unprecedented fish kill of over 33,000 anadromous fish occurred in the lower Klamath River. *PCFFA*, 426 F.3d at 1089.

⁵ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/PCFFA&IGFR/part2/pcffa_155.pdf

designated the Klamath River from Iron Gate Dam to the Pacific Ocean as “critical habitat” for coho. 64 Fed. Reg. 24049 (May 5, 1999).

Being listed as “threatened,” the ESA restricts unauthorized “take” of coho in the Klamath River, including harvest, in order to avoid jeopardy and promote species recovery. 16 U.S.C. § 1538. The depleted populations and ESA take restrictions have significantly limited the Tribe’s ability to harvest coho since 1997, including in 2001. However, the Project impacts, ESA-listing, and currently depressed status of coho, do not affect, as a legal matter, the Tribe’s federal reserved rights to harvest coho or the United States’ affirmative obligation to act to preserve and restore that fishery for the Tribe’s benefit. *Parravano*, 70 F.3d at 547 (“the Tribes’ federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights”). *See also Washington*, 853 F.3d at 965-66 (holding State of Washington violated treaties promising an adequate supply of fish to provide a “moderate living” to Tribes by building culverts that diminished supply of anadromous fish for harvest); Solicitor Opinion M-36979, pp. 28-29 (acknowledging federal duty to rebuild fishery resources in Klamath and Trinity Rivers to “sustain a viable fishery for all user groups”). Reclamation has a federal trust obligation to ensure that coho, a traditional tribal trust resource, do not go extinct through its actions. *Id.*

Project impacts on natural flows and anadromous salmon in the Klamath River are well-documented. NMFS prepared another Biological Opinion for the Project in 2013, which confirmed that Project deliveries significantly impact flow levels and anadromous fish habitat in the Klamath River downstream of Iron Gate Dam.⁶ Fish disease resulting largely from depleted flow levels caused by Project diversions is a significant factor limiting survival and recovery of coho. 2013 BiOp, pp. 220, 222, 341 (“disease effects . . . likely have a substantial impact on the survival of juvenile coho salmon in [the Upper Klamath River reach].” “Of all the adverse effects of [Project operations], NMFS believes that the disease risk from *C. shasta* is the most significant to coho salmon.” *Id.*, p. 377. “NMFS believes the high incidence of disease in certain years within the mainstem Klamath River results largely from the reduction in magnitude, frequency, and duration of mainstem flows from the natural flow regime under which coho salmon evolved.” *Id.*, p. 341. This change in natural flow primarily results from the Project, which blocks flows at Link River Dam from entering the Klamath River.

Impacts to downstream salmon associated with Project operations have caused substantial litigation, in which courts have unanimously confirmed Reclamation’s legal obligation to operate the Project in a manner that satisfies its

⁶The 2013 Biological Opinion (“2013 BiOp”) is available at: <https://www.fws.gov/klamathfallsfwo/news/2013%20BO/2013-Final-Klamath-Project-BO.pdf>

ESA obligations and preserves senior tribal rights. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1146 (enjoining Reclamation to release additional flow into Klamath River for protection of ESA-listed coho); *Patterson*, 204 F.3d at 1214 (Reclamation must release water from Link River Dam as needed to fulfill downstream Tribes' rights "that take precedence over any alleged rights of the Irrigators"); *Kandra*, 145 F. Supp. 2d at 1204-06 (denying irrigators' request to enjoin Reclamation's 2001 operations plan, finding that "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights"); *PCFFA*, 138 F. Supp. 2d at 1251 (enjoining Reclamation from making Project deliveries when flows at Iron Gate Dam drop below levels necessary for coho). Reclamation's duty to release water for senior tribal rights and its ESA obligations takes precedence over any obligation to make irrigation deliveries. *Id.*

Chinook salmon, another anadromous salmon species traditionally harvested by the Tribe with similar biological and habitat needs as coho, also suffer impacts from low flows caused by Project operations. Chinook were the primary victims of the 2002 fish kill that followed resumption of Project deliveries. *PCFFA*, 426 F.3d at 1089. In 2014 and 2015, 81% and 91% of sampled juvenile Chinook were infected with *C. shasta* disease primarily in reaches of the Klamath River between Iron Gate Dam and the Reservation. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112. Due to their similar life histories and biological requirements, and due to the

current relative scarcity of coho, Chinook are used as a surrogate in the 2013 BiOp to determine disease infection rates for coho. 2013 BiOp, p. 390. Water released by Reclamation provides benefit to both tribal trust species of Chinook and coho.

NMFS recently published a 90-day finding on a petition to list the Upper Klamath-Trinity Rivers (UKTR) Chinook salmon as threatened or endangered under the ESA. 83 Fed. Reg. 8410 (2/27/18). NMFS identified disease, associated with low flows and high water temperatures, as a primary threat to Chinook that warranted further investigation into the possible ESA-listing. 83 Fed. Reg. 8413.

In 2017, due to depressed Klamath River Fall Chinook (KRFC) stocks, the Pacific Fishery Management Council (PFMC) closed all fishing in the Klamath Management Zone and severely restricted other ocean fisheries to the north and south. PFMC's combined tribal harvest allocation for adult KRFC in 2017 for the Hoopa and Yurok Tribes was limited to 814 fish to be divided amongst the two tribes, who have a combined membership of approximately 10,000 members. That tribal harvest allocation equated to less than one fish per ten tribal members for all of 2017. The Tribe is clearly not able to meet basic subsistence and ceremonial needs, much less achieve a moderate living based on fish, under such conditions.⁷

Development and operation of the Project has helped decimate a once-thriving fishery to near extinction. Flows in the Klamath River at and upstream of

⁷ Even the comparatively larger Chinook harvests in 2000-2001 cited by Plaintiff-Appellants equate to only 3 to 4 fish annually per member.

the Reservation are governed primarily by Reclamation's Project operations and its releases out of Link River Dam and the subsequent releases from Iron Gate Dam.

Reclamation's releases for protection of coho also serve to protect Chinook.

Reclamation has both a statutory and federal trust obligation to release water to protect all tribal trust species in the Klamath River downstream of the Project.

III. Reclamation Has A Fiduciary Trust Obligation under Federal Law to Protect the Tribe's Fishing and Water Rights.

"The federal government is the trustee of the Indian tribes' rights, including fishing rights." *Parravano*, 70 F.3d at 546; *Joint Board*, 832 F.2d at 1131-32. The government has a duty to preserve the Tribes' rights. *Parravano*, 70 F.3d at 546-47. Reclamation "has a responsibility to divert the water and resources needed to fulfill the [Hoopa Valley] Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"). *Patterson*, 204 F.3d at 1214; *Kandra*, 145 F. Supp. 2d at 1204-1205; Appx. 3342 ("Nawi Memorandum"). As the Tribe's senior rights arise under federal law and pre-date the Reclamation Act, neither Reclamation nor the Tribe are subject to state laws or procedures relating to enforcement or implementation of the Tribe's rights. *Cappaert*, 426 U.S. at 145.

Reclamation's action to release water to the Klamath River was consistent with its trust obligations to downstream Tribes. *Patterson*, 204 F.3d at 1214; *Kandra*, 145 F. Supp. 2d at 1204-1205; *Joint Board*, 832 F.2d at 1131-32 (BIA, in its operation of federal water project, had trust duty to release sufficient water to

protect downstream tribes fishing and water rights, which were senior to irrigation rights); *Pyramid Lake*, 354 F. Supp. at 256 (Interior Secretary, in managing federal water project “was obliged to assert his statutory and contractual authority to the fullest extent possible to [preserve water for the Tribe’s water and fishing rights]”).

The Ninth Circuit Court of Appeals has repeatedly affirmed the Secretary’s authority and duty to take action to protect Hoopa’s federal reserved rights from impacts both within and outside of the Reservation. In *Patterson*, 204 F.3d at 1213-14, the Court explained that Reclamation “has a responsibility to divert the water and resources needed to fulfill the Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators.” In *Parravano*, 70 F.3d at 546-47, the Court affirmed the Secretary’s reliance on the Tribe’s federal reserved fishing rights as applicable federal law that could support emergency ocean fishing regulations (applicable to non-Indians outside the Reservation) designed to ensure that sufficient fish returned to the Reservation for tribal harvest. In *Eberhardt*, 789 F.2d at 1360, the Court found that no specific authorization was required for Interior to enact regulations to protect the Tribe’s fishing rights because Congress provided the Secretary with broad authority and discretion to manage Indian affairs including federal reserved rights. These cases addressing Hoopa rights confirm that Reclamation may invoke its tribal trust duties under federal law as a basis for taking action to protect the Tribe’s reserved rights. These cases also recognize that

off-reservation regulation is necessary to preserve the Tribe's right to harvest anadromous salmon within their Reservation. *Id.*

Other decisions have affirmed federal action, taken consistent with the fiduciary trust obligation to Indian tribes, to protect tribal reserved rights. *Joint Board*, 832 F.2d at 1131-32 (affirming BIA authority and responsibility as trustee to operate federal water project in manner that established stream flow and pool levels necessary to protect tribal fishery and associated unquantified tribal water rights); *Morton*, 354 F. Supp. at 256-57 (Secretary has trust duty "to assert his statutory and contractual authority to the fullest extent possible" in order to preserve water for Indian tribe). *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) (affirming off-reservation federal permit denial grounded in fiduciary duty to protect Indian reserved fishing rights); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (enjoining issuance of federal permit due to potential off-reservation interference with Indian fishing rights). Here, Reclamation appropriately released water within its control for the benefit of downstream beneficiary tribes with rights senior to those of Plaintiffs-Appellants.

Klamath irrigators previously sued to enjoin Reclamation's 2001 operations plan and release of water for downstream salmon before it was implemented, but they failed. *Kandra*, 145 F. Supp. 2d at 1204-1206. The court found that "the United States, as a trustee for the Tribes, is obligated to protect the Tribes' rights

and resources. . . . Reclamation, therefore, has a responsibility to divert the water and resources needed to fulfill the Tribes' rights." *Id.* at 1204. The Klamath irrigators' "contract rights to irrigation water are subservient to ESA and tribal trust requirements." *Id.* at 1201. "Plaintiffs [Klamath irrigators] fail to recognize that Project operations remain subject to the requirements of the ESA and Reclamation's tribal trust obligations, which would preclude the delivery of any irrigation water if the 2001 Plan is set aside." *Id.* at 1205-1206.⁸ Those tribal trust obligations and senior water rights that precluded injunctive relief to the *Kandra* plaintiffs also preclude monetary relief here.

In 2001, Reclamation had an affirmative duty to release water under its control, which had senior priority to any rights of Plaintiffs-Appellants, for the protection of downstream tribal rights. *Patterson*, 204 F.3d at 1213-14; *Joint Board*, 832 F.2d at 1131-32; *Kandra*, 145 F. Supp. 2d at 1204-06. Plaintiffs-Appellants are not entitled to be compensated for any alleged "loss" of water to which they were not entitled to receive in the first place.

⁸ The *Kandra* plaintiffs, like Plaintiffs-Appellants, asserted that Reclamation erred by failing to pursue action against "junior water users" in 2001. The Court rejected these claims noting that Oregon would not take action against any junior water users while the KBA was pending. *Kandra*, 145 F. Supp. 2d at 1202. Oregon's amicus brief to this Court confirms that Oregon would not take any enforcement action against junior water users in 2001 since the KBA was not final.

IV. Oregon Has No Jurisdiction Over, and No Authority to Adjudicate, the Tribe's Federal Reserved Water Rights.

The Klamath River is an interstate river, flowing in Oregon and California. Oregon's Klamath Basin Adjudication ("KBA") is not and cannot be an adjudication of all rights in the entirety of the Klamath River – rather, it is only an adjudication of those rights within Oregon. *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971) (McCarren Amendment only addresses adjudications of rights in river system "within the particular State's jurisdiction"). The Tribe, its Reservation, and its federal reserved fishing and water rights are located within California. Thus, Oregon has no jurisdiction to adjudicate the Tribe's out-of-state rights. *Id.*

In its amicus brief, Oregon concedes the jurisdictional limits of the KBA and of the State. On page 1, Oregon explains that Oregon's Water Resources Department is responsible for "adjudicating rights to the waters of the Klamath Basin *within the boundaries of the State of Oregon.*" (emphasis added). At footnote 7, Oregon contends that "the Bureau of Indian Affairs was required to assert any claims that the Hoopa or Yurok Tribes have to Klamath Basin waters *within Oregon.*" (emphasis added). At page 17, Oregon states: "Any such tribal claims of federal reserved rights to water *in Oregon* was required to be raised in the adjudication" (emphasis added). At no point does Oregon (or any other

party) contend that Oregon or the KBA have any authority to adjudicate or quantify any rights to waters of the interstate Klamath River outside of Oregon.

The Tribe's federal reserved water right for fishery purposes is non-consumptive and entitles the Tribe to maintenance of an instream flow of water in the Klamath River sufficient to maintain and protect its on-reservation fishing rights in California. *Adair*, 723 F.3d at 1410-11; *Walton*, 647 F.2d at 48; *Joint Board*, 832 F.2d at 1131-32. The Tribe does not claim a right to divert or use water within Oregon. Thus, Oregon and the KBA lack any jurisdiction over the Tribe (or the United States on the Tribe's behalf) and its claims arising and located in California. Due to Oregon's lack of jurisdiction, neither the Tribe nor the United States on the Tribe's behalf were required to submit claims in the KBA.

Though located in California, the Tribe's senior downstream rights retain their priority over junior rights of the Klamath Project and Plaintiffs-Appellants in Oregon.⁹ *Bean v. Morris*, 221 U.S. 485 (1911) (affirming decree enforcing senior priority of private rights holder in downstream state against interference by junior private rights holder in upstream state); *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922) (prior appropriation principles apply in disputes involving interstate

⁹ Plaintiffs-Appellants and amici argue the Tribe lacks rights to "waters of the Klamath Project," which is a misnomer - there is no such thing as "waters of the Klamath Project." The Project and claimant irrigators may have rights in the Klamath River, but any such rights are junior to the Tribe's federal reserved water rights for instream flow sufficient to support its on-reservation fishery.

streams). Due to the lack of substantial tributary contribution between Iron Gate Dam and the Reservation, the Tribe's federal reserved water right for maintenance of its on-reservation fishery requires federally-managed releases out of upstream Link River and Iron Gate Dams that block and regulate the flow of the river.

PCFFA, 426 F.3d at 1085 (“The flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river.”).

Such releases take precedence over any junior rights of Plaintiff-Appellants.

Nor are the Tribe's senior rights subject to any equitable apportionment. *Arizona*, 373 U.S. at 596-97 (tribal reserved rights not subject to any equitable apportionment); *Joint Board*, 832 F.2d at 1131-32 (“[o]nly after [tribal] fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority”) (emphasis in original). The Tribe is entitled to have its rights satisfied in full prior to junior rights of upstream water users in Oregon, adjudicated or not. *Id.*

Amici make arguments regarding the McCarren Amendment and its waiver of sovereign immunity as related to state adjudication of reserved rights. The McCarren Amendment does not confer jurisdiction on a state (i.e., an upstream state) to adjudicate portions of an interstate river located within a different state (i.e., a downstream state). *Eagle County*, 401 U.S. at 523. “This result is entirely

logical, because a state court would not have jurisdiction over out-of-state water claimants.” Thomas H. Pacheco, *How Big is Big – The Scope of Water Rights Suits under the McCarren Amendment*, 15 Ecology L. Q. 627, 652 (1988). Oregon has no authority to adjudicate any portion of the Klamath River, or rights therein, which arise or are located outside of Oregon. *Id.*

Interstate streams are only one example where a general stream adjudication might not determine the rights of every water user in the system. The McCarren Amendment does not require a determination of every right in a river system in order to satisfy the Act’s requirement for “comprehensiveness.” *Eagle County*, 401 U.S. at 523. In *United States v. Oregon*, 44 F.3d 758, 767-770 (9th Cir. 1994), the Ninth Circuit acknowledged that the KBA did not adjudicate some post-1909 rights in the Klamath Basin in Oregon nor groundwater rights. The Court, relying on *Eagle County*, held that Oregon’s adjudication was sufficiently comprehensive and that the McCarren Amendment “does not mandate that every hydrologically-related water source be included in the adjudication” and that general stream adjudications authorized under the McCarren Amendment “need not determine the rights of users of all hydrologically-related water sources.” *Id.* at 769. Nothing in the McCarren Amendment requires or more importantly grants Oregon jurisdiction to adjudicate water rights in a different state.

The Tribe's federal reserved water rights are senior to any rights held by Plaintiffs-Appellants. Reclamation, which has control over the flow of water in the Klamath River downstream, has a legal and fiduciary trust obligation to protect the Tribe's reserved rights and ensure sufficient water is released to fulfill its senior rights. Though the Tribe's senior water rights have priority over any rights claimed by Plaintiffs-Appellants, the Tribe's rights do not arise within Oregon, are not subject to Oregon jurisdiction, and have not been waived.

V. Conclusion

For the foregoing reasons, this Court should affirm the CFC decision below.

Respectfully submitted this 21st day of September, 2018.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS

1. I certify that this brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 29(a)(5), because this brief contains 6,992 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Date: September 21, 2018

/s/ Thomas P. Schlosser

Signature of Counsel

Thomas P. Schlosser, Attorney for Hoopa Valley Tribe
Printed Name of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I served a copy of the foregoing brief on counsel of record by: Electronic Means (by CM/ECF).

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